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PEWIRA AFFIN BANK BHD

v.

LIAN HUAT SENG MARKETING SDN BHD

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COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02-949-1999]

C

22 JULY 2008

CIVIL PROCEDURE: *Appeal - Notice of appeal - Striking out - Whether contumelious delay - Whether prejudicial to opposing party*

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There were two applications before the court. One was by Lian Huat Seng Marketing Sdn Bhd ('LHS') to strike out the notice of appeal by Pewira Affin Bank Bhd ('PABB') for want of prosecution with costs and without liberty to file afresh. The other was by PABB for an extension of time to file the appeal record. PABB's claim against LHS was for banking facilities granted.

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Counsel for LHS submitted that PABB's appeal should be struck off as it had been contumelious in its delay in prosecuting its appeal. Also, LHS was greatly prejudiced as, *inter alia*, witnesses were difficult to locate; and PABB's claim for interest would be unfairly increased with the prolonged prosecution of its claim. In reply, counsel for PABB submitted that the previous lawyer who handled the matter did not do any follow up. Also, that they had not received the letter from the High Court informing them that the notes of evidence and the grounds of judgment were ready for collection.

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Held (allowing application to strike out notice of appeal and dismissing application for extension of time to file appeal record)

Per Hashim Yusoff JCA delivering the judgment of the court:

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(1) It was difficult to accept the argument by PABB's counsel that no prejudice had occasioned to LHS on account of the previous solicitor's failure to do any follow up action. The court fully agreed with the submission by counsel for LHS as to why LHS would be greatly prejudiced. (para 21)

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(2) Solicitors for PABB should have acted expeditiously to fetch the notes of evidence and grounds of judgment from the High Court Judge's secretary as soon as they were notified. The excuse given that they had not received the High Court's letter could not be accepted as the solicitors for LHS were aware of the said letter as it was carbon copied to them. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Terdapat dua permohonan di hadapan mahkamah. Satu adalah oleh Lian Huat Seng Marketing Sdn Bhd ('LHS') untuk membatalkan notis rayuan Pewira Affin Bank Bhd ('PABB') kerana ketiadaan pendakwaan dengan kos dan tanpa kebebasan memfail semula. Yang kedua adalah oleh PABB untuk lanjutan masa bagi memfail rekod rayuan. Tuntutan PABB terhadap LHS adalah berkaitan beberapa kemudahan perbankan yang diberikan oleh bank tersebut. Peguam LHS menghujahkan bahawa PABB berlengah-lengah dalam mendakwa rayuannya dan kerana itu rayuan harus dibatalkan kerana bersifat biadab dan menghina. LHS juga dikatakan amat diprejudis antara lain kerana saksi-saksi sukar dikesan, dan tuntutan faedah PABB akan bertambah dengan banyaknya disebabkan kelengahan tersebut. Dalam hujahan balasnya, peguam PABB berkata bahawa peguamcara terdahulu yang mengendalikan kesnya gagal melakukan sebarang tindakan susulan. Dihujahkan juga bahawa mereka tidak menerima apa-apa surat dari Mahkamah Tinggi memberitahu mereka bahawa nota keterangan dan alasan-alasan penghakiman sudah pun siap untuk diambil.

Diputuskan (membenarkan permohonan untuk membatalkan notis rayuan dan menolak permohonan untuk lanjutan masa untuk memfail rekod rayuan)
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Adalah sukar untuk menerima hujah peguam PABB bahawa tiada prejudis menimpa LHS akibat dari kegagalan peguamcara terdahulunya mengambil tindakan susulan. Mahkamah bersetuju sepenuhnya dengan hujah peguam LHS mengenai sebab-sebab mengapa LHS sangat diprejudis oleh kegagalan sedemikian.

A **(2)** Peguamcara PABB sepatutnya bertindak cepat mengambil nota-nota keterangan serta alasan-alasan penghakiman dari pejabat Mahkamah Tinggi sebaik diberitahu mengenainya. Alasan yang diberi bahawa mereka tidak menerima surat dari Mahkamah Tinggi tidak boleh diterima oleh kerana peguamcara
B LHS menyedari tentang surat tersebut kerana salinan telah dihantar kepadanya.

For the applicant - Jayne Koe; M/s Cheah Teh & Su
For the respondent - Adrian Hii Muo Teck; M/s Shook Lin & Bok

C *[Appeal from High Court, Kuala Lumpur; Suit No: D4-22-2004-1989]*

Reported by Usha Thiagarajah

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JUDGMENT

Hashim Yusoff JCA:

[1] In the notice of motion (encl. 10(a)) in 02-949-1999, the
E applicant/respondent, Lian Huat Seng Marketing Sdn. Bhd. ("LHS") is asking that the appellant's, Perwira Affin Bank Bhd. ("PABB'), notice of appeal dated 3 December 1999 be struck off for want of prosecution with costs and without liberty to file afresh. Together with that application the LHS in notice of motion
F (encl. 12(a)) in 02-950-1999, who is the appellant therein, is asking for an extension of time to file the appeal record.

[2] The two applications were heard together. After hearing submissions from the respective counsel, we granted order in terms of encl. 10(a) and struck off the appeals.

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[3] We now give our reasons for doing so.

Background Facts

[4] The chronology of events will show what transpired leading
H to these applications:

[5] On 20 September 1989 in Kuala Lumpur High Court Civil Suit No. D4-22-2004-1989 the PABB, filed a writ against *inter alia*, the LHS and thereafter obtained a judgment in default of
I appearance against the LHS on 21 November 1989.

[6] On 18 September 1990 the LHS applied to set aside the said judgment in default and it was granted by the learned senior assistant registrar (SAR) on 8 March 1991. PABB thereafter on 18 March 1991, lodged a notice of appeal to the judge in chambers against the decision of the learned SAR.

[7] Pursuant to the court's directions on 8 March 1991 LHS's solicitors filed a notice of appearance on 13 March 1991, followed by the LHS defence on 28 March 1991. Thereafter the PABB filed an amended statement of claim dated 18 August 1991.

[8] On 17 December 1991 the PABB filed an application for summary judgment against the LHS, but it was struck off due to non-attendance of the parties on 18 March 1993.

[9] Pursuant to the court order dated 8 March 1991, LHS filed a notice of taxation which was heard and disposed of on 24 June 1993 (some three months after the PABB's summary judgment application was struck out).

[10] On 8 October 1996 (some 3 1/2 years later) the PABB applied to reinstate the summary judgment application which had been struck out. The said application was dismissed by the learned SAR on 4 February 1997.

[11] On 27 December 1996, the LHS then applied to have the PABB's suit dismissed for want of prosecution. This application was allowed by the SAR and the PABB's suit was dismissed for want of prosecution on 20 June 1997.

[12] The PABB then appealed to the judge in chambers against both the court orders dated 4 February 1997 and 20 June 1997 respectively on 5 February 1997 and 27 May 1997. The learned judge dismissed both appeals on 15 November 1999.

[13] On 3 December 1999, the PABB filed two separate notices of appeal dated 3 December 1999 respectively to this court. Thereafter the PABB's application dated 30 December 1999 for extension of time to file the appeal record was allowed by the court on 25 January 2000. The PABB was given three weeks from the date of receipt of the notes of proceedings from the High Court to file the appeal record.

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Counsel's Submission

[14] Learned counsel for the LHS before us, submitted that the PABB's appeal should be struck off for want of prosecution. Reference to the affidavit of the Director of the LHS company
B shows that the PABB has been contumelious in its delay in prosecuting its appeal. Except for a single letter to the High Court Judge's Secretary dated 3 December 1999 to request for the notes of evidence which was copied to the LHS's solicitors, no other step has been taken by the PABB in furtherance of its
C appeals. Even after the PABB obtained an extension of time to file its appeal record from the Court of Appeal, it still did not take any further steps to further or prosecute its appeals. Looking at exh. "YKL5" in encl. 10(b), the learned High Court Judge's Secretary had informed by letter dated 10 September 2002
D addressed to the PABB's solicitors, Messrs Shook Lin & Bok, that the notes of evidence and the grounds of judgment of the said case were ready and that they could be obtained at anytime during office hours.

E **[15]** It was submitted for the reason aforesaid, that PABB's failure to prosecute both its appeals with reasonable diligence and dispatch had resulted in great prejudice to LHS in that:

(a) PABB's claim is purportedly for banking facilities pursuant to a letter of offer dated 12 August 1983;

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(b) As the PABB's claim refers to purported transactions dating as far back as 1983, LHS would have difficulty in locating all of its witnesses as some of its directors and managers have since resigned without leaving any forwarding addresses.

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(c) Furthermore the 3rd defendant in the High Court case, ie, Ng Lak (P) who would have been a relevant witness for LHS's defence has since passed away on 7 April 1992.

(d) PABB purported claim for interest is on a sum of
H RM1,461,912 at 10% per annum calculated on the daily outstanding balance from 6 July 1989 until date of full payment. By prolonging its prosecution of its claim, the PABB's claim for interest would have been unfairly increased to astronomical proportions.

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[16] Learned counsel for the PABB in his reply submitted that the previous lawyer who handled this matter was the one who did not do any follow up. As far as he was concerned, he had taken the appropriate action. He however admitted that there was no follow up done earlier until they were reminded by LHS's counsel.

Court's Finding

[17] The main issue before us is whether the PABB's notices of appeal and/or appeals should be struck off for want of prosecution.

[18] As submitted by the learned counsel for PABB, its solicitors, Messrs Shook Lin & Bok by letter dated 3 December 1999 had written to the secretary of the High Court Judge requesting for the notes of evidence to enable them to file their appeal record not later then 13 January 2000. Then on 30 December 1999, PABB's solicitors by letter (exh. HMT2) wrote to the learned President of the Court of Appeal for an extension of time to file the appeal record pursuant to Practice Direction of the Court of Appeal No. 1 of 1996. This application for extension of time was allowed by the learned President of the Court of Appeal *vide* letter dated 25 January 2000 (exh. HMT3) and PABB was to file the appeal record within three weeks from the date of receipt of the notes of proceedings.

[19] The High Court then issued a letter dated 16 September 2002 to inform the PABB's solicitors Messrs Shook Lin & Bok, that the notes of evidence and the grounds of judgment were ready and that they could be fetched at anytime during office hours (exh. HMT4).

[20] The only explanation given by PABB's solicitors as seen in the affidavit of Adrian Hii Muo Teck dated 18 May 2004, in encl. 12(a) at para. 8, is that they "did not receive the letter and were not aware of it until informed by the respondent's solicitors in April 2004". Thereafter PABB's solicitors straight away collected the notes of evidence and the grounds of judgment on 20 April 2002 and filed the appeal record on 26 April 2004.

[21] It is difficult for us to accept the argument by the learned counsel for PABB that no prejudice had occasioned to LHS on account of the previous solicitor's, who was handling the matter, failure to do any follow up action. We fully agree with LHS's

counsel submission as to why the LHS had been greatly prejudiced on the grounds as submitted by her in para. 15 (a)-(d) above.

[22] Solicitors for PABB should have acted expeditiously to fetch the notes of evidence and grounds of judgment from the High Court Judge's secretary as soon as they were notified. We cannot accept the excuse given by the solicitor that they had not received the High Court's letter dated 16 September 2002 addressed to them because LHS's solicitors were aware of the said letter which was carbon copied to them.

[23] For the reasons aforesaid we granted order in terms of encl. 10(a) in W-02-949-1999 and dismissed the application in encl. 12(a) in W-02-950-1999 with costs to be taxed in both notices of motion. The two appeals are also struck off for want of prosecution and without liberty to file afresh.

[24] My learned brothers, Richard Malanjum, JCA (as he then was) and Wahab Patail, J have read this judgment in draft and have expressed their agreement with it.